Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

ZORA ENTERPRISES, INC.,

Petitioner,

v.

CHARLES E. BURNETT, JR. and ANNE E. BURNETT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Massachusetts Supreme Judicial Court commit an error when they denied the Petitioner access to the courts to present their constitutional issues related to ownership of a road?

PARTIES AND CORPORATE DISCLOSURE

All parties are named in the caption.

The Petitioner, Zora Enterprises, Inc. is not a publicly held corporation and is not owned by a parent corporation.

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STATEMENT OF JURISDICTION

The Petitioner seeks review of a decision of the Massachusetts Supreme Judicial Court dated September 10, 2004 which denied the Petitioner's Petition for Further Appellate Review.

Jurisdiction is conferred by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Article One, Section 10, Paragraph 1:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Statement of Facts

The Burnetts' lot is on the corner of Old Knoll Road and Converse Road (a public way) in Marion, Massachusetts. The Burnetts' lot is shown on a plan entitled "Plan of Land in Marion, Mass. Surveyed for Joseph P. Zora and Glenna M. Zora" dated August 1966, a copy of which is attached to the Judgment in the case of Charles E. Burnett, Jr. and another vs. Zora Enterprises, Inc., Commonwealth of Massachusetts, Plymouth Division, Superior Court Dept., docket no. 97-1369 dated July 26, 2001 included in the Appendix.

On or about March 3, 1965, Joseph P. Zora and Glenna M. Zora acquired the property located on Converse Road, Marion, Massachusetts from Robert H. Talbot and Margaret D. Talbot. The lot which was later acquired by the Burnetts, was originally conveyed by the Zoras to Arthur C. and Jeanne P. Hickey in April 1967. The property was described by a specific description consisting of courses and distances that did not include Old Knoll Road. At the time of the conveyance to the Hickeys, Joseph and Glenna Zora owned adjacent land to which access was provided by Old Knoll Road. The intention of the parties was to reserve the title in Old Knoll Road in Joseph P. and Glenna M. Zora.

In 1972, Zora Enterprises acquired the remaining Talbot property, which then consisted of Old Knoll Road and a 12 foot lot immediately adjacent to the northerly boundary of the Burnett lot, along with approximately 75 acres of adjacent land from Joseph P. and Glenna M. Zora.

Over the years Zora Enterprises has improved and used Old Knoll Road for the development of and access to its residential subdivisions. In 1997, Zora Enterprises installed an underground sewer in that portion of Old Knoll Road between the paved portion of the road and the Burnett lot.

The Massachusetts Appeals Court decision (affirmed by the denial of the Petition for Further Appellate Review by the Massachusetts Supreme Judicial Court) takes away the ownership of Old Knoll Road from Zora Enterprises for the entire width of the road adjacent to the Burnett lot thereby cutting off their ownership of the road which serves as the access for Zora Enterprises subdivisions to a public way. Appendix E.

This Petition is concerned with two cases which were considered together by the Massachusetts Supreme Judicial Court.

B. Federal Question Considered

The first case contained an adverse possession claim involving ownership of Old Knoll Road brought as a counterclaim by Zora Enterprises in response to a claim of record title by the Respondent Burnetts in 1997. During the course of that case, on or about March 29, 1999, the Burnetts filed a Motion for Partial Summary Judgment seeking a judgment establishing the ownership of Old Knoll Road under the provisions of Massachusetts General Laws Chapter 183:58 which states that:

> Construction of Instrument Passing Title to Real Estate Abutting Way, Watercourse, or Monument.
>
> Every instrument passing title to real estate abutting a way, whether public or private,

> watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, watercourse or monument, unless (a) the grantor retains other real estate abutting such way, watercourse or monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.

The legislation which created the above statute was passed on August 19, 1971. *See* Chapter 684 of the Acts of 1971, a copy of which is included in the Appendix G. Section 2 of Chapter 684 applied the statute retroactively to prior executed instruments. Chapter 185 of the Acts of 1973 passed on April 17, 1973, inserted the word "fee" in front of the word interest and confirmed the retroactive applicability. Appendix H. The Motion for Partial Summary Judgment was opposed by Zora Enterprises. In an order dated June 1, 1999, the court applied General Laws Chapter 183:58 retroactively, and the court ruled that the Burnetts had fee ownership of Old Knoll Road. The court further ruled that there were disputed issues of fact on the claims of Zora Enterprises to Old Knoll Road on theories of adverse possession and prescriptive easement. A copy of the Memorandum and Order on Plaintiff's Motion for Partial Summary Judgment dated June 1, 1999 is included in the Appendix A.

The Petitioner sought to amend the adverse possession case to include a claim that the retroactive application of G.L. c. 183:58 is unconstitutional. This motion was denied by the trial court on April 25, 2000, and on June 9, 2000 a single justice of the Appeals Court upheld the ruling after the Petitioner took an interlocutory appeal.

The case was tried to a jury on July 9, 2001 and July 10, 2001. The Petitioner brought a Motion for Directed Verdict on the issue of the retroactive applicability of G.L. c. 183:58, and this motion was denied by the trial court.

After a jury trial, judgment entered in the adverse possession case in favor of the Petitioner Zora Enterprises, Inc. finding that they have title by adverse possession to that portion of Old Knoll Road which is adjacent to the lot owned by the Burnetts. *See* Appendix B for Judgment. The Burnetts appealed from that judgment. In a decision dated June 21, 2004, the Massachusetts Appeals Court reversed the judgment and held that the Burnetts owned Old Knoll Road adjacent to their lot on the basis that Zora Enterprises had not used Old Knoll Road in a manner which was irreconcilable with its use as its way. *See* Appendix E for Appeals Court decision.

In the second case, the Petitioner Zora Enterprises sought to challenge the constitutionality of the retroactive application of Massachusetts General Laws Chapter 183, section 58 as applied to Old Knoll Road. The constitutional case was filed on July 24, 2000. The basis for the constitutional challenge were the U.S. Constitution, Article One, Section 10, Paragraph 1 (impairment of obligation of contract); Fifth Amendment to the U.S. Constitution, (taking); and Fourteenth Amendment to the U.S. Constitution (due process).

The case was dismissed by the court on December 15, 2000 on the grounds that the June 1, 1999 order in the adverse possession case between the parties prevented the Petitioner Zora Enterprises from requesting another judicial decision regarding the applicability of G.L. c. 183:58. A copy of the trial court's Memorandum of Decision and Order on the Defendants' Motion to Dismiss dated December 15, 2000 is included in the Appendix C.

On December 21, 2000, the Petitioner filed a Notice of Appeal from the dismissal of the constitutional case. Appendix E.

The Appeals Court decision dated June 21, 2004 affirmed the dismissal of the constitutional case.

The Petitioner filed a Petition for Further Appellate Review from the adverse Appeals Court decision. In addition to the constitutional issues raised in the trial court, the Petitioner argued in the Petition for Further Appellate Review that the decision of the Appeals Court denied the Petitioner its First Amendment right of access to the courts.

REASONS FOR GRANTING THE PETITION

I. Access to the Courts

The petitioner's position is that the decision of the Appeals Court (which was affirmed when the Petition for Further Appellate Review was denied by the Supreme Judicial Court), which reversed the judgment in favor of Zora Enterprises on the adverse possession case and upheld the dismissal of the constitutional case, has the effect of denying Zora Enterprises any forum in which to litigate the constitutional issues, which interferes with the petitioner's

First Amendment right of access to the courts. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

The Appeals Court faulted Zora Enterprises for not appealing the denial of the Motion to Amend the adverse possession case to bring the constitutional claims. However, the judgment in Zora Enterprises' favor on the adverse possession case is analogous to the situation in which a party whose summary judgment motion is denied ultimately prevails after a trial. See *District Attorney for the Hampden District v. 35 Publications*, 35 Mass. App. 66 (1993). Additionally, Zora Enterprises took an appeal from the dismissal of the separate constitutional case.

The Petitioner further contends that there is substantive merit to its constitutional challenges to the retroactive applicability of G.L. c. 183:58.

II. Impairment of the Obligation of Contracts

Article I, Section 10, para. 1 of the U.S. Constitution provides in relevant part that:

> No state shall . . . pass . . . any Law impairing the Obligation of Contract . . .

The threshold issue in a claim brought under the Contracts Clause is that there must be a substantial impairment of a contractual relationship. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). The retroactive application of G.L. c. 183:58 (*see* Massachusetts Acts and Resolves, 1971, c. 684, sec. 2; Massachusetts Acts and Resolves 1973, c. 185, sec. 2), operates to deprive Zora Enterprises of a fee interest in Old Knoll Road. The original

contract was between Joseph and Glenna Zora and the Hickeys when the property was conveyed to the Hickeys without the inclusion of Old Knoll Road, which remained in the Zoras' ownership. Zora Enterprises was the successor to this contract right. *See Wood v. Lovett*, 313 U.S. 362 (1941) (change in legislation which permitted a previous owner to attack the tax title of a subsequent owner held to be unconstitutional).

The Burnetts contention in the trial court was that if G.L. c. 183:58 is not applied Zora Enterprises would still not have a fee interest in the road under common law principles of construction of a deed. Their contention is that there is a presumption that a description which states that the land conveyed is bounded by a way includes an interest in the way. Assuming for the sake of argument that the Burnetts are correct about the common law rule of construction Zora Enterprises has still lost substantial rights. Under the common law the presumption "could be overcome by clear proof of a contrary intent of the parties ascertained from the words used in the instrument in light of all the attendant facts." For instance under the common law Zora Enterprises would be entitled to prove and argue that their clear intention would not have been to "land lock" a 75 plus acre parcel by conveying their interest in Old Knoll Road to the first owner of the Burnetts' lot. *Tattan v. Kurlan*, 32 Mass. App. 239, 243 (1992), Further appellate review denied, 412 Mass. 1105 (1992). The legislation providing for the retroactive application of G.L. c. 183:58 did not provide for any grace period or mechanism by which Zora Enterprises could address the change imposed. Therefore, Zora Enterprises has met the threshold of showing substantial impairment.

In order for a law to withstand a constitutional challenge under the Contracts Clause, "the State, in justification must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. vs. Kansas City Power & Light Co.*, 459 U.S. 400, 412-13 (1983). The Massachusetts Appeals Court in *Tattan* noted that no legislative history appears to exist. *Tattan, supra* at 247, footnote 5. Accordingly, any attribution of a legitimate public purpose would be speculative. For this reason the statute is unconstitutional.

If there was some legitimate public purpose, the next inquiry is whether:

> the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.

Energy Reserves Group, Inc. v. Kansas City Power & Light Co., 459 U.S. 400, 412-13 (1983).

It is problematic to argue about the reasonableness of the law when the purpose is not known. Was the legislation passed to create certainty in road ownership so that abandoned roads could be improved? If that was the purpose then it is not reasonably served by eliminating the fee interest in the road of a Zora Enterprises who has continued to use and improve the road.

The determination of this claim will require findings of fact by the trial court (e.g. whether Zora Enterprises intended to land lock their adjoining land). For these reasons there is a cause of action under the Contract Clause.

III. Due Process

The retroactive application of G.L. c. 183:58 also violates the Due Process clause of the Fourteenth Amendment to the U.S. Constitution. This court has stated that:

> "Our standard of review is settled:
>
> "Retroactive legislation does have to meet a burden not faced by legislation that has only future effects. 'It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.' But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." Pension Benefit Guaranty Corporation v. R. A. Gray & Co., 467 U.S. 717, 730 (1984) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976)) (citation omitted)."

United States v. Sperry Corporation, 493 U.S. 52, 64 (1989).

Because there is no legislative history the legislative purpose is not clear or is not clearly served by the retroactive application of the statute to the facts of this case. The retroactive application of the statute has resulted in a substantial loss to Zora Enterprises of the fee interest in the road without any apparent benefit to the public.

IV. Taking

The Fifth Amendment to the U.S. Constitution states that ". . . nor shall private property be taken without just compensation."

Zora Enterprises has lost the fee interest in Old Knoll Road. Though Zora Enterprises still has rights of access and use of the road, they do not have the control of the road that ownership entails. Accordingly, the Fifth Amendment is implicated. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). The extent of the taking would have to be determined on a remand to the trial court

CONCLUSION

For the reasons stated above the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE MASSACHUSETTS APPEALS COURT DATED JUNE 21, 2004

02-P-161

02-P-1618 Appeals Court

ZORA ENTERPRISES, INC. vs.
CHARLES E. BURNETT, JR., & another'
(and a companion case')

Nos. 02-P-161 & 02-P-1618

Plymouth. December 16, 2003. – June 21, 2004.

Present: Laurence, Cowin, & McHugh, JJ.

Real Property, _ Adverse possession. *Statute*, _ Retroactive application. Way.

Civil action commenced in the Superior Court Department on October 24, 1997.

The case was tried before *Richard J. Chin*, _ J. July 24, 2004.

A motion to dismiss was heard by *Richard J. Chin*, _ J. Jr. for Zora Enterprises, & another,

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' Charles E. Burnett, jr., and Anne E. Burnett vs. Joseph P. Zora, Jr., and Zora Enterprises, Inc.

Appendix A

COWIN, J. We consider appeals arising from determinations in the Superior Court regarding ownership of the fee interest in a portion of a way located in the town of Marion. When the smoke from the two proceedings cleared, it had been decided that (1). Charles E. Burnett, Jr., and Anne E. Burnett (the Burnetts) would, in ordinary circumstances, own the disputed fee interest by virtue of the operation of G. L. c. 183, § 58;[3] (2) the contention of Zora Enterprises, Inc., that the statute could not constitutionally be applied retroactively to the conveyance at issue was precluded; but (3) Zora Enterprises, Inc., had acquired title to the property by means of adverse possession. The Burnetts appeal, in case no. 02-P-1618 from the judgment declaring that title to the property is in Zora Enterprises, Inc., by adverse possession. In Zora's appeal, we affirm the judgment dismissing the complaint of Zora Enterprises, Inc. In the Burnetts' appeal, we reverse the judgment declaring that Zora Enterprises, Inc., has obtained title to the property by adverse possession.

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3. General Laws c. 183, § 58, as appearing in St. 1990, c. 378 § 58, provides, in pertinent part: "Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, watercourse, or monument [with certain exceptions not relevant in this case], unless . . . the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line." See *Tattan v. urlan*, _ 32 Mass. App. Ct. 239, 242-243 (1992).

While the statue by its terms does not apply retroactively to all instruments of conveyance executed prior to its effective date, it does apply to the conveyance at issue here. See St. 1971, c. 684, § 2; St. 1973, c. 185, § 2; and St. 1990, c. 378, § 2.

Appendix A

1. *Background.* The material facts do not appear to be genuinely disputed. On or about March 3, 1965, Robert H. Talbot and Margaret D. Talbot conveyed to Joseph P. Zora and Glenna M. Zora real property located on Converse Road in the town of Marion. This parcel adjoined a larger landlocked parcel that the Zoras had acquired earlier from James Hartley and others. The Zoras mortgaged the property (to Wareham Cooperative Bank) and subdivided the newly acquired property into two lots.

In late 1966, Joseph Zora, who planned to subdivide and develop most of his real estate in the area, began to lay a surface over Old Knoll Road, a way shown on a plan of the property as abutting the lots acquired from the Talbots, and then extending beyond those lots into the Zoras' other land. On or about April 17, 1967, the Zoras conveyed a portion of the land bordering on Converse Road to Arthur C. Hickey and Jeanne P. Hickey. This parcel was subsequently acquired by the Burnetts in 1995. (See plan attached as an appendix.) The deed referred to the conveyed footage as bounded by Old Knoll Road. No part of Old Knoll Road was expressly conveyed to the Hickeys. The deed expressly excluded the fee interest in a twelve-foot strip along the northern border of the conveyed parcel (referred to in the appendix as the "water main easement").

Joseph Zora continued to develop the way shown on the plan as Old Knoll Road. Beside surfacing approximately a twenty-foot wide portion of the approximately fifty-foot wide way, he caused both telephone and electrical lines to be laid. Between 1969 and 1970, he extended the pavement of the way to the rear of the two front lots into his remaining

subdivided real estate. On or about January 21, 1972, the Zoras conveyed all of their remaining real estate in the area to Zora Enterprises, Inc., a family controlled corporation (henceforth, Zora). Zora continued to maintain Old Knoll Road as a route to its developing rear properties, authorizing use of the way by those who had acquired real estate within the rear subdivision while excluding use by others.

In 1997, Zora installed a sewer line beneath Old Knoll Road, apparently cutting down trees along the way in the process. This construction caused the Burnetts to commence an action against Zora and Joseph P. Zora, Jr.,[1] seeking a declaration that they were the owners of the fee underlying Old Knoll Road; injunctive relief; and damages for trespass, including the cutting of trees, see G. L. c. 242, § 7, and for violation of *G. L. c. 93A. Zora* counterclaimed, praying for a declaration that it owned the fee underlying the way, as well as the fee in the water main easement; a judgment quieting title; and damages for trespass. In the alternative, Zora claimed that, if it were determined that title had once been in others, Zora either had acquired title to the fee underlying the way by adverse possession or had a prescriptive easement over the way.

Acting on the Burnetts' motion for partial summary judgment, a judge of the Superior Court determined that the deed from Joseph Zora and Glenna Zora conveying the parcel in question to the Hickeys in 1967 was to be construed in accordance with the provisions of G. L. c. 183, § 58, see

[1] Why the Burnetts joined Joseph P. Zora, Jr. as a defendant is unclear. He was subsequently dismissed as a party defendant by agreement.

note 3, *supra*, and *Rowley* v. *Massachusetts Elec. Co.*, 438 Mass. 798, 801-803 & n.10 (2003), and thus that the Hickeys, and subsequently the Burnetts, owned the fee interest in Old Knoll Road. Nevertheless, the judge declined to grant summary judgment in favor of the Burnetts on the title issue, concluding that disputed questions of material fact precluded summary adjudication of Zora's counterclaim that it had acquired an interest in the property in question by adverse possession or prescriptive use.[5] While the matter was awaiting trial, Zora filed a motion to amend its counterclaim to add a prayer for a declaratory judgment that retroactive application of G.L. c. 183, § 58, to the 1967 deed to the Hickeys was unconstitutional.[6] The motion to amend was denied Zora did not file a notice of appeal from the eventual final judgment in that case.[7]

Thereupon Zora commenced.

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5. The judge also concluded that Joseph Zora and Glenna Zora, at the time of the 1967 conveyance to the Hickeys, had retained title to the fee in the twelve-foot wide "water main easement." This determination has not been challenged on appeal.

6. Zora's constitutional arguments are based on the contracts clause of the United States Constitution, art. I, § 10, cl. 1, the due process clauses of the Fourteenth Amendment to the United States Constitution and of art. 12 of the Massachusetts Declaration of Rights, and the takings clause of the Fifth Amendment of the United States Constitution.

7. Zora sought leave from a single justice of this court to prosecute an interlocutory appeal from the order denying its motion to amend the counterclaim, but its petition was denied. This effort, of course, is not a substitute for an appeal from the final judgment.

a new proceeding in the Superior Court seeking essentially the same relief. The complaint was dismissed by a second judge on the ground that a prior action was pending in a court of the Commonwealth, see Mass.R.Civ.P. 12(b)(9), 365 Mass. 754 (1974), and Zora appealed from the judgment.

Trial of the first case then ensued. The Burnetts waived their claims for damages for trespass and violation of G. L. c. 93A, and the case proceeded on Zora's counterclaim regarding title. The Burnetts' motion for a directed verdict in their favor on Zora's counterclaim was denied, and the jury returned a verdict that Zora had obtained title by adverse possession to the fee underlying the portion of Old Knoll Road that abutted the Burnetts' lot.[8]

2. The Zora's complaint seeking a declaration that the retroactive application of G. L. c. 183, § 58, to the 1967 conveyance deprived it of various constitutional rights was dismissed on the basis of the prior pending action between the parties. See Mass.R.Civ. P. 12 (b) (9).[9] Zora contends that the dismissal has deprived it unfairly of an opportunity to obtain an adjudication of its constitutional claims. However, Zora had that opportunity and did not pursue it.

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8. The jury also found that the Burnetts had cut down trees on the water main easement and awarded Zora damages of one dollar. This determination has not been appealed.

9 . The Burnetts also sought dismissal on the ground that Zora's constitutional claims should have been asserted as a compulsory counterclaim in the prior proceeding, but the motion judge rejected this theory.

Appendix A

In moving for summary judgment on their claim of title to the fee underlying Old Knoll Road, the Burnetts expressly cited G. L. c. 183, §58, as a basis for their claim. Zora recognized this in its opposition to the motion, and even referred to the fact that the Burnetts sought retroactive application of the statute. Nevertheless, Zora did not defend on the ground that such retroactive application was unconstitutional. Rather, Zora argued that the statute was not applicable to the 1967 conveyance to the Hickeys because, at that time, the property was mortgaged to Wareham Cooperative Bank; title was therefore in the lender rather than the grantors; and thus the grantors had no title to convey that was affected by the statute. This with respect to third parties. See *Boston* v. *Storage & Warehouse Co.*, 312 Mass. 638, 648-649 (1942); *Hanna* v. *Framingham*, 60 Mass. App. Ct. 420, 425 (2004). Thus, the Zoras' 1967 conveyance to the Hickeys and the application of G. L. c. 183, § 58, to it, were unaffected by the fact that the property was mortgaged.

If Zora had claims that the retroactive application of G. L. c. 183, § 58, was unconstitutional, it was incumbent on Zora to assert that contention at the time that the statute's application was being decided. Failure to do so waived the contention. See *Ballerino v. Ballerino,* 436 Mass 1005, 1006 (2002); *Fidelity Mgmt & Research Co. v. Ostrander*, 40 Mass. App. Ct. 195, 200 (1996). It was not sufficient to revive the issue for Zora to move, more than ten months after the judge's

ruling on the Burnetts' motion for partial summary judgment, for leave to amend its counterclaim. Denial of that motion was within the judge's discretion, a proposition apparently recognized by Zora in that it took no appeal therefrom.

There is some indication in the record that, at the subsequent trial, Zora attempted to assert its constitutional claims against retroactive application of the state as a defense to the Burnetts' contention that the statute conferred title to the way upon them. We fail to understand how Zora was assisted by this. The meaning and application of G. L. c. 183, 58, had been adjudicated on partial summary judgment two years earlier; nothing suggests that the trial judge was prepared to revisit that interlocutory order; and the trial was addressed not to the Burnetts' claim under the statute, on which they had already prevailed, but instead to Zora's counterclaim for adverse possession or prescriptive easement. Consequently, no revival of Zora's constitutional claim took place at the trial. We note further that, having prevailed at trial on its adverse possession claim, Zora was apparently content to accept title on that basis, and took no appeal with respect to rulings pertaining to G. L. c. 183, § 58. In addition, Zora has made no argument on appeal in support of its adverse possession judgment that in any way implicates the merits of retroactive application of the statute.

The course ultimately chosen by Zora to litigate its constitutional claims was the independent complaint that was subsequently dismissed pursuant to Mass.R.Civ.P. 12(b)(9). Dismissal under this rule is proper when the same parties are involved in two actions, one begun before the other, and

"[i]t is apparent from the face of the present complaint . . . that all the operative facts relied on to support the present action had transpired prior to the commencement of the first action. "*Keen v. Western New England College*, 23 Mass. App. Ct. 84, 85-87 (1986). That is the case here. That events transpiring in the first case have binding effect on the plaintiff in the second case makes enforcement of the policies underlying rule 12(b)(9) more, not less desirable.[10] There was no error in dismissing Zora's complaint.[11]

3. *Appeal from judgment of adverse*

We turn to the Burnetts' appeal from the judgment of adverse possession in favor of Zora. We conclude that the Burnetts' motion for directed verdict will be granted "only where, construing the evidence most favorably to the [nonmoving party,]it is still insufficient to support a verdict in his favor." *DiMarzo* v. *S & P Realty Corp.*, 364 Mass. 510, 514 (1974). "If, upon any reasonable view of the evidence, there is found a combination of facts from which a

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10. In support the action of the motion judge under Mass.R.Civ.P. 12(b)(9), we do not mean to eliminate the possibility that the case could have been decided on the basis of claim preclusion. However, the Burnetts did not press this theory and the judge did not act on this ground.

11. *Striar* v. *Cooper*, 6 Mass. App. Ct. 841, 841-842 (1978), is of no assistance to Zora. Unlike the present case, the claims in *Striar* were "separate and distinct," and dismissal under rule 12(b)(9) would have had the effect of denying relief on one of the claims without the plaintiff having any opportunity to litigate it. By contrast, Zora had an opportunity to litigate its constitutional claims and do not do so.

rational inference may be drawn in favor of the [nonmoving party]," then a directed verdict is not appropriate. *Chase v. Roy*, 363 Mass. 402, 404 (1973). Here, the evidence was insufficient to support a finding in Zora's favor.

A party who seeks title by adverse possession of land lying within the bounds of an established way is "bound to prove occupation of the land irreconcilable with its use as a way, openly, notoriously, adversely, and without interruption for more than twenty years." *Brennan* v. *DeCosta*, 24 Mass. App. Ct. 968, 969 (1987). Here, the case was tried by both parties on the theory that Zora had permissive rights in Old Knoll Road. That is clear from Zora's alternative contention that it had a prescriptive easement, as well as from the Burnetts' assertion in this appeal that Zora already had nonexclusive rights in the way (but did not own the fee).

If the adverse claimant (Zora) already has a nonexclusive right to use the way, that use cannot be "irreconcilable" with use of the property as a way. *Ibid.*_ Activities affecting the way undertaken by Zora (constructing from an unimproved condition, authorization to install utility lines, general upkeep) did not impede the rights of others to make use of it, if anything, the improvement and upkeep facilitated use by others. That Zora purported to grant to others permission to use Old Knoll Road is of no significance. If Zora was not in fact the owner, it had not permission to give or withhold, and its intent is irrelevant. See *Kendall* v. *Selvaggio*, 413 Mass. 619, 623-624 [12] (1992)

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12. Because we conclude that the evidence of adverse possession was insufficient to reach the jury, we need not address the Burnetts' contention that the jury instructions were erroneous.

Appendix A

4. *Disposition.* The judgment in appeal no. 02-P-161 is affirmed. The portion of the judgment in appeal no. 02-P-1618 specifying that Zora has acquired title to the disputed portion of Old Knoll Road by adverse possession is reversed. A declaratory judgment that the Burnetts have title to that portion of Old Knoll Road that abuts their property shall be entered.

So ordered.

APPENDIX B — JUDGMENT OF THE COMMONWEALTH OF MASSACHUSETTS, PLYMOUTH DIVISION, SUPERIOR COURT DEPARTMENT DATED JULY 26, 2001

COMMONWEALTH OF MASACHUSETTS
PLYMOUTH DIVISION

SUPERIOR COURT DEPT.

DOCKET NO. 97-1360A

CHARLES E. BURNETT JR. AND ANNE E. BURNETT PLAINTIFFS AND DEFENDANTS IN COUNTERCLAIM vs. ZORA ENTERPRISES, INC. AND JOSEPH P. ZORA, JR., DEFENDANTS AND PLAINTIFFS IN COUNTERCLAIM

JUDGMENT

This action came on for trial before the Court and a jury, Richard Chin, J., presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

I. As to Count I (Declaratory Judgment) and Count IV (Injunctive Relief) of the Complaint of Charles E. Burnett, Jr. and Anne E. Burnett and as to Count Two (possession), Count Three (Prescriptive easement), Count Four (quiet title), and Count Five (declaratory judgment) of the Answer and Counterclaims of the Defendant Zora Enterprises Inc. that:

A. The plaintiff in Counterclaim, Zora Enterprises, Inc., a Massachusetts Corporation with a place of

business at 231 Converse Road, Marion, Massachusetts 02738, is the owner in fee simple of all of Old Knoll Road, which is located immediately adjacent to the land of the Defendants in Counterclaim, Charles E. Burnett, Jr. and Anne E. Burnett, said land being located at 224 Converse Road, Marion, Massachusetts, and shown on a plan entitled "Plan of Land in Marion, Massachusetts Surveyed for Joseph P. and Glenna M. Zora" dated August 1966 recorded at the Plymouth Registry of Deeds at Book 3355 Page 260, a copy of which is attached to this Judgment. The land of the Defendants Charles E. Burnett, Jr. and Anne E. Burnett is described in a Deed from James C. Coulter and Patricia C. Coulter to Charles E. Burnett, Jr. and Anne E. Burnett dated January 3, 1995 and recorded at the Plymouth Registry of Deeds at Book 13353 Page 164.

B. The Plaintiff in Counterclaim, Zora Enterprises, Inc., is the owner in fee simple of the 12 foot strip of land located immediately adjacent to and northwesterly of the land of the Defendants in Counterclaim, Charles E. Burnett, Jr. and Anne E. Burnett. Said 12 foot strip is shown on a plan entitled "Plan of Land in Marion, Massachusetts Surveyed Joseph P. and Glenna M. Zora" dated August 1966 recorded at the Plymouth Registry of Deeds at Book 3355 Page 260. The land of the Defendants Charles E. Burnett, Jr. and Anne E. Burnett is described in a Deed from James C. Coulter and Patricia C. Coulter to Charles E. Burnett, Jr. and Anne E. Burnett dated

Appendix B

January 3, 1995 and recorded at the Plymouth Registry of Deeds at Book 13353 Page 164.

C. Count Five (declaratory judgment) of the Counterclaim of Zora Enterprises, Inc. be dismissed as moot.

D. Count IV (Injunctive Relief) of the Complaint of the Plaintiffs Charles E. Burnett, Jr. and Anne E. Burnett be dismissed:

3. The Plaintiffs Charles E. Burnett, Jr. and Anne E. Burnett take nothing from the Defendants Zora Enterprises, Inc. and Joseph P. Zora, Jr. on Count II (Trespass) and Count III (M.G.L. Chapter 93A) of their Complaint, that the action be dismissed as to these counts.

4. As to Count One of the counterclaim of Zora Enterprises, Inc. under Massachusetts General law Chapter 242 section 7, the Plaintiff in Counterclaim, Zora Enterprises, Inc. recover $1.00 from the Defendants in Counterclaim, Charles E. Burnett, Jr. and Anne E. Burnett.

5. Zora Enterprises, Inc., the Defendant and Plaintiff in Counterclaim, shall recover costs from the Plaintiffs and Defendants in Counterclaim, Charles E. Burnett and Anne E. Burnett in the amount of $5608.65.

Date: 7/26/01

s/ Richard Chin
Richard Chin, Associate Justice of the Superior Court

APPENDIX C — JUDGMENT ON MOTION TO DISMISS OF THE COMMONWEALTH OF MASSACHUSETTS, PLYMOUTH DIVISION, SUPERIOR COURT DEPARTMENT DATED DECEMBER 18, 2000

Commonwealth of Massachusetts
County of Plymouth The Superior Court

CIVIL DOCKET# PLCV2000-00808

Zora Enterprises Inc vs
Burnett Jr et al

JUDGMENT ON MOTION TO DISMISS
(Mass.R.Civ.P. 12b)

This action came on for hearing before the Court, Richard J. Chin RAJ upon the Defendant's, Charles E Burnett Jr, Anne E Burnett, motion to dismiss pursuant to Mass. R.Civ.P. 12(b), and upon consideration thereof,

It is ORDERED and ADJUDGED:

That the Complaint of the plaintiff, Zora Enterprises Inc is hereby dismissed against the defendant(s), Charles E Burnett Jr, Anne E Burnett.

Dated at Plymouth, Massachusetts this 18th of December, 2000.

Francis R. Powers,
Clerk of the Courts

By: s/ John B. Deady
Assistant Clerk

APPENDIX D — MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS OF THE COMMONWEALTH OF MASSACHUSETTS, PLYMOUTH DIVISION, SUPERIOR COURT DEPARTMENT DATED DECEMBER 15, 2000

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION NO.
00-0808-A

ZORA ENTERPRISES, INC.

vs.

CHARLES BURNETT, JR. and another[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Zora Enterprises, Inc. ("Zora") has filed this action requesting that this court declare it unconstitutional to retroactively apply G.L. c. 183, § 58, because that application would constitute a taking of land without just compensation, deny plaintiff due process of law, and constitute a violation of the contract clause of the U.S. Constitution. The defendants, Charles E. Burnett and Anne E. Burnett ("the Burnetts"), have filed a motion to dismiss this action pursuant to Mass. R. Civ. P. 12(b)(9) and 13 on the grounds that there is prior action pending between the parties on the same set of facts and that this claim should

1. Anne E. Burnett.

have been brought as a compulsory counterclaim in that action, *Charles E. Burnett, Jr. and Anne E. Burnett* v. *Joseph P. Zora, Jr. and Zora Enterprises, Inc.*, Civil Action No. 97-1360A (Plymouth Superior Court). Defendants have also requested that they be awarded legal fees and expenses under G. L. c. 231, § 6F. For the reasons stated below, defendants' motion to dismiss is *ALLOWED* and defendants' motion for fees and costs is DENIED.

BACKGROUND

The Burnetts filed a complaint in Plymouth County Superior Court on October 23, 1997, seeking a declaratory judgment to determine the ownership of two areas of land in Marion, Massachusetts. The first area is a portion of Old Knoll Road and the second is a twelve foot strip of land, both which abut the Burnetts' property. See *Charles E. Burnett, Jr. and Anne E. Burnett* v. *Joseph P. Zora, Jr. and Zora Enterprises, Inc.*, Civil Action No. 97-1360A (Plymouth Superior Court). On June 2, 1999, the court entered a Memorandum and Order on Plaintiffs' Motion for Partial Summary Judgment determining that the Burnetts had obtained a fee interest in the road under G.L. c. 183, § 58, but that interest would be subject to any claim of adverse possession or prescriptive easement, which the defendant may prove at trial. On or about April 3, 2000, Zora filed a motion to amend the counterclaim to add a request for a declaration that the application of G.L. c. 183, § 58, in the summary judgment decision, was unconstitutional. This motion to amend was denied on April 27, 2000, and Zora appealed to a single justice of the Appeals Court, which denied the petition. On July 24, 2000, Zora then filed the complaint in this action and the defendants filed this motion to dismiss.

Appendix D

DISCUSSION

Mass.R.Civ.P. 12(b)(9) allows a party to move for dismissal where a prior action is pending between the two parties in a court in this Commonwealth. Dismissal is proper only if the parties in both actions are the same and the issue is the same. See *Conant* v. *Sherwin L. Kantrovitz, P.C.*, 29 Mass. App. Ct. 998, 999 (1990). Rule 12 (b)(9) precludes a plaintiff from attempting in a subsequent action to undermine a court's judgment establishing the validity of a claim. See *Yentile* v. *Howland*, 26 Mass. App. Ct. 214, 216 (1988); *Keen* v. *Western New England College*, 23 Mass. App. Ct. 84 n.3 (1986).

Mass. R. Civ.P. 13(a), requires that a defendant assert all counterclaims against the plaintiff arising out of the same transaction or occurrence as the underlying action. If the defendant fails to raise such claim, s/he will be barred from raising the claims at a later date. See *Yentile* v. *Howland*, *Super; Buckley* v. *John*, 314 Mass. 719, 721 (1943). If the counterclaim requires the presence of an additional party, the rules of joinder should be applied to bring that party into the case. Mass. R.Civ. P. 13(h).

Defendants have argued that *Mass.R.Civ.P. 13* should apply to bar this claim. The plaintiff's request for a declaratory judgment, however, is not a compulsory counterclaim to the prior pending action because the parties could not have been expected to anticipate how the court would apply G.L. c. 183, § 58 in the decision on the motion for partial summary judgment. Therefore, *Mass.R.Civ. P.13* does not bar the complaint in this action. The basic problem

with the complaint, however, is that it requests that this court find that the previous decision on the motion for summary judgment is invalid because it requires the retroactive application of G.L. c. 183, § 58, which is unconstitutional. The plaintiff is requesting another judicial decision regarding the applicability of G.L. c. 183, § 58. If the plaintiff disputes that ruling, the issue can be eventually heard by the Appeals Court. Zora is not entitled to another ruling on this issue by this court. See *Yentile*, supra. This court must therefore dismiss the complaint.

The Burnetts have requested that this court award them legal fees and costs in pursuing this motion to dismiss, pursuant to G.L. c. 231, § 6F, claiming that this action was "wholly insubstantial, frivolous and not advanced in good faith." G.L. c. 231, § 6F. Although this complaint must be dismissed, counsel for the plaintiff has attempted to zealously advocate for their client. This court does not find that the claim was not advanced in good the defendant's motion for legal fees and costs must be denied.

ORDER

For the reasons stated above, it is *ORDERED* that the defendants' motion to dismiss be ALLOWED and defendants' motion for fees and costs be *DENIED*.

s/ Richard J.Chin
Richard J.Chin
Justice of the Superior Court

DATED: December 15, 2000

APPENDIX E — MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT OF THE COMMONWEALTH OF MASSACHUSETTS, PLYMOUTH DIVISION, SUPERIOR COURT DEPARTMENT DATED JUNE 1, 1999

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 97-1360-A

CHARLES E. BURNETT, JR., et al

vs. JOSEPH P. ZORA, JR., et al

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiffs' motion for partial summary judgment must be denied. The plaintiffs are correct that the application of G.L. c. 183, sec. 58, would give them fee ownership of Old Knoll Road. Defendants' argument that, at the time of the original conveyance from Zora to Hickey, Old Knoll Road was subject to a mortgage to the Wareham Cooperative Bank is unavailing. The Massachusetts rule that between mortgagor and mortgagee the fee lies with the mortgagee only applies to those parties. It does not affect third parties, concerning whom ownership rests with the mortgagor. 28 M.P.S., sec. 9.3, p. 195.

Appendix E

However, I cannot say on this record that the defendants have no reasonable likelihood of establishing either ownership by adverse possession, or an easement by prescription. Genuine issues of material fact remain on those issues.

On the question of the disputed twelve foot strip, (the "water main easement"), ownership is in the defendant Zora Enterprises, Inc. The metes and bounds description in the relevant deeds can be read consistently with the plan referred to in the deeds. There is no conflict or ambiguity. The twelve foot strip was not included in the original conveyance to the Hickeys, and thus ownership was retained by the grantor. Therefore factual issues remain on those counts dealing with the twelve foot strip.

ORDER

Plaintiffs' Motion for partial summary judgment is DENIED.

s/ Patrick F. Brady
Patrick F. Brady
Justice of Superior Court

Dated: 1 June 99

APPENDIX F — ORDER OF THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS DENYING FURTHER APPELLATE REVIEW DATED SEPTEMBER 10, 2004

Supreme Judicial Court
for the Commonwealth of Massachusetts
One Beacon Street, Third Floor,
Boston, Massachusetts 02108 (617) 557-1020

Docket No. FAR-14243

ZORA ENTERPRISES, INC. VS. CHARLES E. BURNETT, JR., & another (and a companion case)

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 09/10/04, the above captioned Application for Further Appellate Review was denied. (Cowin, J., recused.)

Susan Mellen, Clerk

Dated: September 10, 2004

APPENDIX G — MASSACHUSETTS ACTS AND RESOLVES OF 1971

Chap. 684. AN ACT FURTHER REGULATING THE CONSTRUCTION OF INSTRUMENTS PASSING TITLE TO REAL ESTATE BOUNDED ON A WAY, WATERCOURSE OR MONUMENT.

Be it enacted, etc., as follows:

SECTION 1. Chapter 183 of the General Laws is hereby amended by adding after section 57 the following section:

Section 58. Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence, or other monument, shall be construed to include any interest of the grantor in such way, watercourse or monument, unless (a) the grantor retains other real estate abutting such way, watercourse and monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument

evidences a different intent by an express exception or reservation and not alone by bounding by a side line.

SECTION 2. Section fifty-eight of chapter one hundred and eighty-three of the General Laws, added by section one of this act, shall take effect on January the first, nineteen hundred and seventy-two and shall apply to instruments executed on and after said effective date and to instruments executed prior thereto, except that as to such prior executed instruments this act shall not apply to land registered and confirmed under the provisions of chapter one hundred and eighty-five before said effective date or to the extent that any person or his predecessor in title has changed his position as a result of a decision of a court of competent jurisdiction.

Approved August 19, 1971.

Appendix G

Chap. 185. AN ACT CONSTRUING INSTRUMENTS PASSING TITLE TO REAL ESTATE BOUNDED ON A WAY, WATERCOURSE OR MONUMENT AS INCLUDING ANY FEE INTEREST OF THE GRANTOR THEREIN.

Be it enacted, etc., as follows:

SECTION 1. Section 58 of chapter 183 of the General Laws, added by chapter 684 of the acts of 1971, is hereby amended by inserting after the word "any", in line 3, the word: - fee.

SECTION 2. Section fifty-eight of chapter one hundred and eighty-three of the General Laws, as amended by section one of this act, shall take effect as of January the first, nineteen hundred and seventy-two and shall apply to instruments executed on and after said effective date and to instruments executed prior thereto, except that as to such prior executed instruments this act shall not apply to land registered and confirmed under the provisions of chapter one hundred and eighty-five of the General Laws before said effective date or to the extent that any person or his predecessor in title has changed his position as a result of a decision of a court of competent jurisdiction.

Approved April 17, 1973.